Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DEANA ROMERO, individually and as legal representative of the estate of CONRAD JAMES ROMERO,

Petitioner

v.

WILLIAM J. THOMPSON and CHARLES EDWARD BLACKBURN, SR.,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May a court of appeals properly exercise jurisdiction over a governmental official's interlocutory appeal of a summary judgment order denying a claim of qualified immunity when the plaintiff's complaint sufficiently alleges the violation of clearly established law (i.e., deliberate indifference to the medical needs of a pretrial detainee) and the appeal challenges the district court's determination that genuine issues of material fact exist as to whether the allegedly violative conduct occurred?

2. When presented with an interlocutory appeal of a summary judgment order that determines genuine issues of material fact exist precluding the application of qualified immunity, may a court of appeals, *sua sponte*, defer completely to the plaintiff's factual claims of alleged conduct raised by the summary judgment record to determine if a constitutional tort occurred at all?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are the following:

1. Deana Romero, individually and as legal representative of the Estate of Conrad James Romero, who was Plaintiff and Appellee.

2. William J. Thompson, who is Sheriff of Donley County, Texas, and who was, both individually and in his official capacity, a Defendant and an Appellant.

3. Charles Blackburn, Sr., who is a former Deputy of Donley County, Texas, and who was, both individually and in his official capacity, a Defendant and an Appellant.

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IN THE
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DEANA ROMERO, individually and as legal representative of the estate of CONRAD JAMES ROMERO,

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v.

WILLIAM J. THOMPSON and CHARLES EDWARD BLACKBURN, SR.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Deana Romero, individually and as legal representative of the Estate of Conrad James Romero, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on May 14, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not been reported. It is reprinted in the appendix hereto, App. pp. 20-32.

The Order Denying in Part and Granting in Part Defendants' Second Motion for Summary Judgment of the United States District Court for the Northern District of Texas, Amarillo Division, (Robinson, D.J.) has not been reported. It is reprinted in the appendix hereto, App. pp. 1-19.

JURISDICTION

Invoking federal jurisdiction under both 42 U.S.C. §1983 and diversity of citizenship for related state law claims, the Petitioner brought this suit in the Northern District of Texas, Amarillo Division. On October 19, 1995, the District Court denied the Respondents' motions for summary judgment finding that genuine issues of material fact existed as to whether a violation of §1983 occurred and as to whether qualified immunity therefore required dismissal of Plaintiff's claims. See App. pp. 1-19.

On Respondents' Appeal, the Fifth Circuit on May 14, 1996, entered a judgment and an opinion dismissing the appeal to the extent that it was brought in Respondents' official capacities and reversing the District Court's order and directing that Respondents be dismissed as defendants on the basis that the summary judgment record reflected that a violation of §1983 did not occur. The Petition for Rehearing was denied on June 13, 1996. See App. pp. 21-32.

The jurisdiction of this Court to review the judgment of the Fifth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

28 U.S.C. §1291. Final decisions of district courts.

The courts of appeals (other than the United States Circuit Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in Sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

The underlying lawsuit, in part, is a civil rights case involving the suicide of a pre-trial detainee that Respondent county jail officials allegedly consciously allowed to occur in the Donley County Jail in Clarendon, Texas.[1] Petitioner's husband, Conrad Romero, who presented an open and obvious suicidal disposition, was knowingly placed in a cell with a forty-foot extension cord and left unobserved for two hours by jail personnel. In general, the federal claim at issue is that for the deprivation of due process rights under the Fourteenth Amendment due to the deliberate indifference to the serious medical needs of the Decedent pursuant to 42 U.S.C. §1983.

Petitioner filed her Original Complaint on February 3, 1994. In her Complaint, Petitioner alleged that her deceased husband was arrested by Respondents and taken to the Donley County Jail where "based upon the facts known by Donley County employees present, it was a foreseeable consequence that, if left unattended," he "would attempt to harm himself and that he posed an immediate danger to his own safety and well being." Conrad Romero allegedly "exhibited obvious and apparent despondent, irrational and incoherent behavior openly . . ." and as a result "under the circumstances known" to the Respondents he "posed a clear threat to his own safety and well-being." She further alleged that "[d]espite knowledge of the suicidal tendencies" of

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[1] In addition to Respondents in their individual and official capacities, Petitioner sued a jailer, Deputy Toni Bohlar, and Donley County, Texas under § 1983 and for various state law claims not at issue here. The District Court dismissed Bohlar pursuant to the summary judgment order appealed from. Donley County remains a party below, although the Court of Appeals directed that all federal claims against it be dismissed.

Conrad Romero, Respondent Blackburn knowingly failed to remove an extension cord "placed in the cell where Romero was incarcerated." Despite that Conrad Romero's "perilous state of threatened safety and medical need was open and obvious" to Respondents, allegedly "no observation or monitoring of Decedent was conducted" and Romero "was found hanging" by the "electrical extension cord provided to him" by Respondents. Finally, specifically, Petitioner alleged that Respondents' "conduct" . . "constituted deliberate indifference to the serious medical needs of Romero ", a suicidal detainee, thereby denying the Decedent access to medical care, and such conduct caused the deprivation of his constitutional rights in accordance with 42 U.S.C. §1983."[2]

Respondents responded to the Complaint by contemporaneously filing a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6) and a Motion for Summary Judgment under Federal Rule of Civil Procedure 56. After timely response, the Motion to Dismiss was denied and the Motion for Summary Judgment was denied without prejudice to refiling. The Respondents subsequently filed an answer expressly asserting qualified immunity as a defense to the §1983 claims and discovery proceeded.

Respondents filed their second Motion for Summary Judgment on March 16, 1995, which is the motion resulting in the subsequent appeal. The second motion included as the "Issues of Law" upon which it was based the following:

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[2] Petitioner also brought a § 1983 claim against Thompson and Donley County due to their alleged failure to train amounting to deliberate indifference to known risks of suicides including Romero's. The Court of Appeals held such claim could not stand absent proof that "Romero was an obvious and manifest suicide risk." App. p. 29-30.

"1. Each official of Donley County who is named as a Defendant is entitled to qualified immunity under 42 U.S.C. §1983 because a reasonable official in their position would not believe that Conrad Romero was going to commit suicide. Conrad Romero did not indicate by his behavior to anyone that he would commit suicide."

. . . .

"3. All Defendants are entitled to summary judgment with respect to Plaintiffs' claims under 42 U.S.C. §1983 since the summary judgment evidence indicates that no Donley County official was on notice of any behavior of Conrad Romero that would indicate that he had "obviously serious medical needs" and also because there was no deliberate indifference by these officials."

By her timely responses, Petitioner presented summary judgment evidence tending to show that the Respondents knew of Conrad Romero's medical need yet took no preventative action.[3] The evidence further indicated that Respondents knowingly placed Conrad Romero together with a ready method and the physical means to take his own life.

The District Court ruled that there was a "genuine issue of material fact and that under the evidence presented a reasonable jury could return a verdict" for Petitioner on her §1983 claim. App. p. 2. The District Court examined Petitioner's "factual allegations" as set out in her Complaint and her responses to Respondents first motion to dismiss and first and second motions for summary judgment, including the affidavits and exhibits attached thereto. Id. In light of

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[3] The evidence included deposition excerpts, investigative records and affidavits reflecting that Romero fit within a common profile of that class of pretrial detainee known to be at risk of suicide, and that Romero was acting strangely and was believed to be under the influence of a depressant.

the District Court's reading of prior precedent "that deliberate indifference to the obviously serious medical needs of a pretrial detainee violates his or her constitutional rights" (citing Bell v. Wolfish, 441 U.S. 520, 535-36, 99 S.Ct. 1861 (1979)) the District Court determined that Respondent "produced competent evidence, including expert testimony", that Respondents exhibited "deliberate indifference to Romero's serious medical needs, including suicidal tendencies". App. p. 14. Furthermore, citing Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991), the District Court held that prior to considering the application of qualified immunity, it had considered Petitioner's "factual allegations" and concluded that they were sufficient to show a potential violation of constitutional rights. App. p. 14-15. The District Court further held that this Court's holding in Johnson v. Jones, 115 S.Ct. 2151 (1995) "clearly applies to this case" in that the summary judgment order was not a "final decision" under 28 U.S.C. §1291. App. p. 11.

Respondents invoked the Court of Appeals' jurisdiction under 28 U.S.C. §1291 due to the effective denial of qualified immunity from suit alleging:

> "(1) the District Court's Order stated merely that a genuine issue of material fact existed but did not demonstrate from the record that controlling summary judgment facts were actually in conflict and since (2) Appellants have shown as a matter of law that the facts undisputed by the parties indicate that no violation of constitutional right occurred at all."

Further, Respondents perfected their interlocutory appeal from the summary judgment order to the Court of Appeals for the Fifth Circuit upon the following pertinent issues:

> "I. Do Appellants have a right to an interlocutory appeal under Mitchell v. Forsyth in light of the fact that the District Court did not demonstrate that material facts were in conflict

and because the controlling Summary Judgment facts regarding the constitutional claim and justifying summary judgment are undisputed by the Parties?"

"II. Did the United States District Court err, as a matter of law, in denying the second motion of Defendants for summary judgment in light of the fact that appellee failed to adduce legally-competent and admissible proof in support of each element of her claims asserted against appellants and further since appellee failed to adduce any legally-competent evidence to show a violation of any law that was clearly established at the time?"

Despite the invocation of jurisdiction on the basis of the purported absence of facts "actually in conflict" and that the "undisputed" facts reflect no constitutional violation occurred at all, the Court of Appeals found jurisdiction by "deferring completely to Plaintiff's factual claims of alleged conduct" as proffered by Petitioner in the Summary Judgment record. App. p. 23.

After this perfunctory jurisdictional analysis, the Court of Appeals next addressed the standard by which it would determine the application of qualified immunity. The Court of Appeals relied upon its opinion in Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996), which held that liability attaches under § 1983 for the episodic act or omission of a state jail official only where the official acted or failed to act with deliberate indifference to the detainee's needs. App. p. 23-24. "Deliberate indifference" was held in that case to mean that the official "knows that the inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." Id. This legal standard appeared to be synonymous with that utilized by the District Court where it stated:

"The federal courts have long made it clear that deliberate indifference to the obviously serious

> medical needs of a pretrial detainee violates his or her constitutional rights."

App. p. 14. Indeed, nowhere in its opinion did the Court of Appeals take issue with the District Court's analysis of the sufficiency of Petitioner's allegations of violations of clearly established law.

The Court of Appeals then undertook a review of the summary judgment record and held that at most, the evidence presented by Petitioner was "merely colorable on the critical issue of whether defendants knew that Romero faced a substantial risk of suicide, and was not such that a reasonable jury could return a verdict for the nonmoving party." App. p. 26. The Court of Appeals determined that "on this record there is no underlying constitutional violation . . .." App. p. 29. Finally, the Court of Appeals reversed the summary judgment as to Respondents in their individual capacities and remanded the case to the District Court to dismiss the Respondents as defendants.

REASONS FOR GRANTING THE PETITION

This Court's decision in Behrens v. Pelletier, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996) has caused confusion to both the bench and bar as to the import of Johnson v. Jones, 510 U.S. _____, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995). The Fifth Circuit has taken a position in this case, purportedly based upon Behrens, that renders Johnson v. Jones meaningless and flies in the face of reasoned jurisprudence. This case presents the opportunity to clarify what is and what is not a "final order" under Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) and Mitchell v. Forsyth, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Specifically, the Fifth Circuit, under the guise of determining whether certain alleged conduct constituted a violation of clearly established law, has undertaken the procedure of a fact-based review of a summary judgment record to determine whether that factual record presents conduct violative of clearly established law. Here, this was particularly harmful where the procedure was performed, *sua sponte*. Petitioner, pre-trial, believing she only must raise genuine issues of material fact as to specific elements of her claim challenged by a motion for summary judgment, was ambushed on appeal by a fact-based review treating a purposely limited evidentiary record as a full trial record. Applied in other cases, this procedure will revive the harms sought to be avoided by Johnson v. Jones and lead to the effective erasure of the purpose of this unanimous decision.

I. JOHNSON AND BEHRENS SHOULD PRECLUDE AN APPEAL OF AN ORDER DETERMINING THAT GENUINE ISSUES OF MATERIAL FACT EXIST AS TO SUFFICIENTLY ALLEGED VIOLATIONS OF CLEARLY ESTABLISHED LAW, HENCE THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS.

Respondents' Motion for Summary Judgment did not rest upon whether the law concerning conscious indifference to medical needs was clearly established, nor any other legal issue associated with qualified immunity. Indeed, it is particularly pertinent that Respondents did not appeal the

denial of their Motions to Dismiss, which clearly presented a legal issue. Rather, their Motion for Summary Judgment rested upon whether or not the facts occurred as Plaintiff alleged. The case at bar, as Johnson v. Jones, involves an immunity defense based entirely on a denial of the facts (i.e., whether or not Romero manifested a suicidal disposition known to Respondents.) Clearly, whether the Defendants did the deeds alleged is a question for trial. Elliot v. Thomas, 937 F.2d 338 at 341 (5th Cir. 1991).

This Court in Johnson v. Jones conducted an analysis of the issues pertaining to fact-based versus law-based appeals, citing Federal Practice and Procedure by Wright, Miller and Cooper (hereinafter "Wright & Miller") for an important proposition: "if [immunity appeals] could be limited to . . . issues of law . . . there would be less risk that the Court of Appeals would need to waste time in duplicating investigations of the same facts on successive appeals." See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10 p. 664 (1992). This Court stated that compared with Mitchell, considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources, argue in favor of limiting interlocutory appeals of "qualified immunity" matters to cases presenting more abstract issues of law. Considering these "competing considerations," this Court stated that it was persuaded that "[i]mmunity appeals . . . interfere less with the final judgment rule if they [are] limited to cases presenting neat abstract issues of law." See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10, p. 664 (1992), cf. Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 113 S.Ct. 684 at 689 (noting the argument for a distinction between fact-based and law-based appeals, but seeing no "basis for drawing" it with respect to the particular kind of order at hand); 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10 at 85 (Supp. 1995). This Court stated that nonetheless, "the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of Mitchell to encompass appeals from orders of the sort before us." Johnson v. Jones, 115 S.Ct. at 2158.

Johnson melds this Court's holdings in Mitchell and Cohen in an effort to cast much needed light upon the appealability of denials of motions for summary judgment based upon qualified immunity. The Johnson opinion was hailed as providing "a welcome bit of certainty in a complex corner of the finality doctrine." 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10 p. 97 (Supp. 1996). An order such as the District Court's denial of summary judgment in the case at bar is not an appealable final order considered in this framework of Mitchell and Cohen as refined by Johnson. It was clearly stated in Johnson that a summary judgment order which determines only a question of evidence-sufficiency, which facts a party may be able to prove at trial, is not an appealable final order. Id. This comports with Mitchell, which held that only appeals challenging the purely legal issue of what law is clearly established, are immediately appealable final orders. 10 No. 5 Fed. Litigator 154 (July 1995). Furthermore, it comports with Cohen which defined the conceptual issue of appealability in terms of separability explaining that when the issue sought to be appealed is a district court determination that the evidence is not sufficient to permit a particular finding of fact following trial, it often will be difficult to separate that issue from the fact related legal issues that likely underlie plaintiff's claims. Id.

As Wright & Miller correctly point out, citing fundamental principles involved in the litigation of civil rights issues, the very nature of the claims involved in civil rights litigation often present factual issues that require summary judgment to be denied. 10A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §2732.2 pp. 342-343 (1992). In many such constitutional and civil rights cases, such as the case at bar, a necessary element of the claim for relief presents an inquiry into the state of mind of one or more of the parties (here, whether the defendants knew that Romero faced a substantial risk of serious harm). Claims requiring a determination regarding intentions or motives are particularly unsuitable for summary adjudication. Id. Furthermore, actions alleging violations of the Due Process or Equal Protection Clauses of the Fifth and Fourteenth Amendments also often cannot be resolved on a Rule 56 motion because the court must determine whether the

defendant acted maliciously or with deliberate indifference to the plaintiff's constitutional rights. Id. at 346-347. Applying this framework to the case at bar, the District Court's Order denying summary judgment cannot be considered an immediately appealable final order. As such, despite its purported deferral to the "factual allegations," the Court of Appeals acted without jurisdiction.

A. Allegations in a complaint sufficient to indicate a violation of clearly established law should preclude appealability in the summary judgment context.

Petitioner's allegations in her complaint were sufficient to establish the violation of a clearly established right, pursuant to this Court's holding in Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789 (1991)(See App. p. 14) which sought to clarify the structure under which a claim of qualified immunity should be addressed. In so doing, the Court set forth the proper analytical framework for determining whether a Plaintiff's allegations are sufficient to overcome a Defendant's defense of qualified immunity asserted in a motion for summary judgment.

The first inquiry into the examination of a claim for qualified immunity is whether an allegation of a clearly established constitutional right has been made. In other words, it first must be determined whether the Plaintiff has asserted a violation of constitutional right at all. Siegert v. Gilley, 500 U.S. 226, 111 S.Ct. 1789, 1793 (1991). This Court in Siegert applied that analysis to determine that the plaintiff had not alleged a constitutional deprivation. The Court of Appeals' reversal of the District Court's denial of a motion to dismiss based on qualified immunity, was thus affirmed.

Considering the case at bar in light of this framework, it is undisputed below that Plaintiffs' allegations are sufficient. Furthermore, neither the Fifth Circuit nor the District Court determined after review that the Plaintiff's pleadings were insufficient. Indeed, Respondents did not appeal the denial of their Motion to Dismiss which centered

on this issue. In fact, to quote the order of the District Court:

> The court should first determine from looking at the pleadings whether a Plaintiff has satisfactorily alleged facts showing a potential violation of constitutional or statutory rights before going on to consider whether a Defendant is entitled a qualified immunity. Siegert v. Gilley, 111 S.Ct. 1789, 1793, 114 L.Ed. 2d 277 (1991). With this in mind, the Court has considered Plaintiff's factual allegations. The Court concludes that the Plaintiff has alleged sufficient facts and has produced some evidence showing a- potential violation of constitutional rights by only two of the individual Defendants."

App. p. 14. Petitioner's pleadings were sufficient.

That an appealable legal issue was not presented here is reflected by Farmer v. Brennan, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) which considered an *Eighth Amendment* claim made against prison officials based upon the allegation that the official had denied humane conditions of confinement. This Court, in an effort to eliminate inconsistent construction of the deliberate indifference standards among the circuits held that "deliberate indifference" as that term is applied to claims made against prison officials under the Eighth Amendment, must be considered *subjectively*. In so holding, this Court stated:

> "Under the test we adopt today, an Eighth Amendment claimant need not show that a prison official acted or failed to act in believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." Farmer 114 S.Ct. 1970 at 1981.

Importantly, this Court stated that the issue of whether a prison official had the requisite knowledge of substantial risk, so as to have a duty to protect the prisoner from harm is a *question of fact* subject to determination in its usual

ways, including inference from circumstantial evidence (emphasis supplied). Id. at 1981.

This Court went on to hold that a fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious. Id. at 1981. As an example for this proposition this Court stated that if a risk was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." Id. at 1981-1982.

What is described above is persuasively applicable to the case at bar. The Donley County Jail experienced a suicide 15 months prior to Romero's suicide and separate attempted suicides, thus the Respondents were certainly aware of the stated risk, and that risk could be accurately described, exactly as above, as "longstanding, pervasive, well documented and expressly noted by prison officials in the past." Farmer thus is important in an evaluation of the Fifth Circuit's actions in the case at bar as it permits the inference of knowledge even in the absence of *direct* evidence, and therefore should have persuaded the Fifth Circuit from making the determinations that it did. Regardless, the decision of the District Court as to the legal standard to be applied does not conflict with this reasoning.

Also noteworthy is that the issue of whether the deliberate indifference standard, as applied to a claim under the Fourteenth Amendment by a pretrial detainee, has been left open. Farmer v. Brennan, 114 S.Ct. 1970 (1994). Claims made under the Eighth Amendment *should* be held to a different standard, as the interests protected by the Eighth Amendment are clearly applicable in a limited set of circumstances which are inapplicable to the Fourteenth Amendment. Furthermore, a pretrial detainee may not be punished. As this Court noted in Wilson v. Seiter, 501 U.S. 294 at 291-30, 111 S.Ct. 2321 (1991), the deliberate indifference standard serves under the Eighth Amendment to ensure that only the infliction of *cruel and unusual*

punishment carries liability. (emphasis added). Nevertheless, this legal standard was not a basis of the appeal nor the reasoning of the Court of Appeals.

The Fifth Circuit opinion of Hare v. City Corinth, MS, 74 F.3d 633 (5th Cir. 1996), which was published during the briefing period of Respondent's appeal to the Fifth Circuit, set forth the distinction between the constitutional rights of a prisoner, and the constitutional rights of a pretrial detainee. Hare involved an appeal which concerned the legal issue of the correct legal standard to apply. The Court noted that pretrial detainees and convicted prisoners look to different constitutional provisions for their respective rights to basic needs such as medical care and safety. The constitutional rights of a convicted state prisoner spring from the Eighth Amendment's prohibition of cruel and unusual punishment, see Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285, 291, 50 L.Ed. 2d 251 (1976), and, with a relatively limited reach, from substitutive due process. The constitutional rights of a pretrial detainee, on the other hand, flow from both the procedural and substantive due process guarantees of the Fourteenth Amendment. See Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed. 2d 447 (1979). Significantly, Bell instructs that the state must distinguish between pretrial detainee and convicted felons in one crucial respect: the state cannot punish a pretrial detainee. Id. at 535, 99 S.Ct. at 1872. Considering the distinction set forth above, the Fifth Circuit held that the subjective standard set forth in Farmer does apply to a pretrial detainee. The Fifth Circuit interpreted the Farmer holding to ask only whether an official "punished" an inmate, not whether the punishment was cruel and unusual.

Hare thus held that the state owes the same duty under the Due Process Clause of the Fourteenth Amendment and under the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care, and protection from harm during the period of confinement and that a state jail official's liability for episodic acts or omissions cannot attach unless the official had subjective knowledge of substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk. Hare 74 F.3d at 650. The Fifth

Circuit thus held that the same standard should be applied regardless of the fact that it is not lawful to punish a pretrial detainee.

Petitioner's complaint sufficiently alleged a violation of clearly established law in accord with Siegert, Farmer and Hare. The District Court's order properly viewed the evidence in light of this standard. Consequently, the order appealed from did not present an appealable issue. The jurisdictional analysis should have ended here.

Johnson v. Jones conclusively established that official immunity appeals cannot be taken to resolve pretrial determinations of the sufficiency of the evidence. The opinion is treated as establishing a "clear rule" for "I didn't do it" cases. That rule being that qualified immunity summary judgment denials in such cases are not immediately appealable final orders. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3914.10 p. 96 (Supp. 1996).

The nature of a motion for summary judgment does not necessarily lend itself to the presentation of concrete legal issues. A district court may terminate litigation by rendering a summary judgment pursuant to Rule 56 that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d. 265 (1986). Once the movant makes an initial showing with competent evidence, the party opposed must offer evidence reflecting the existence of one or more genuine issues of material fact. Id., 477 U.S. at 322-323, 106 S.Ct. at 2552. The bare allegations of the pleadings will not suffice. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d. 202 (1986); Celotex Corp., 477 U.S. at 323-25, 106 S.Ct. at 2553. The nonmoving party must designate specific facts showing there exists a genuine issue of material fact on those elements sought to be negated by the movant. Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510; Celotex Corp., 477 U.S. at 322-23, 106 S.Ct. at 2553; Fed.R.Civ.Pro. 56(e). Legal conclusions and general allegations do not satisfy this burden. Liberty Lobby, 477 U.S. at 250, 106 S.Ct. at 2511. The movant

however must specify those areas where it believes there is no disputed fact issue to its favor. While an allegation of the existence of a disputed material fact is not sufficient to defeat a motion for summary judgment, if the evidence shows that a reasonable jury could return a verdict for the nonmoving party, then the dispute is genuine. Id., 477 U.S. at 247-248, 106 S.Ct. at 2510; Green v. Touro Infirmary, 992 F.2d 537, 538-39 (5th Cir. 1993).

This Court in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970) emphasized that the availability of summary judgment turned upon whether a proper jury question was presented. In that case, this Court reversed the District Court's granting of summary judgment, pointing out that "the moving parties' submissions had not foreclosed the possibility of the existence of certain facts from which "it would be open to a jury . . . . to infer from the circumstances" that there had been a meeting of the minds. Id., at 158-159, 90 S.Ct. at 1608, 1609. Likewise, Respondents in the case at bar, have not, by their Second Motion for Summary Judgment, foreclosed the possibility of the existence of multiple facts within the Petitioner's allegations which would support an inference from the circumstances that the Respondents had knowledge of Romero's presentation of obvious suicidal indications, and were aware of a serious risk, but chose to ignore it. Indeed, Petitioner was only required to provide sufficient evidence on specific areas of her claim. The nature of the motion was limited.

As often is the case, Respondents' Motion for Summary Judgment was specific, and set forth limited issues. Petitioner, in order to overcome her summary judgment burden was required to produce some evidence on only those issues raised. The result is a specific issue, and a specific evidentiary requirement. To allow the Fifth Circuit to go beyond what was required to be shown by Petitioner to defeat summary judgment, and conduct an evidentiary review of the appellate record, expands the concept of what is a final order and goes well beyond the scope of review of collateral orders as set forth in Mitchell, Cohen, and Johnson.

The District Court in its denial of Defendants' Second Motion for Summary Judgment, found numerous specific issues of material fact that precluded the granting of summary judgment. The District Court found these issues to be indistinguishable from Johnson v. Jones. Indeed, the Court begins its analysis by setting forth the holding of Johnson v. Jones and stating "this holding clearly applies to this case." App. p. 11. Furthermore, the Court cites Johnson v. Jones following its statement that "upon this disputed factual record, the Court determines that summary judgment cannot be granted these two defendants." App. p. 16. (App. pp. 3-16)

Taking into account each of the issues described by the District Court in its Order, the nature of the order, in part, clearly was fact-based. Further, given the District Court's detailed analysis of each fact issue in its Order, it is apparent that the Defendants' Motion for Summary Judgment was denied due to the existence of genuine issues of material fact, and that the District Court went to great lengths to make this point. Further, as previously established, the appealable legal standard was both correct and unchallenged. Therefore, as presented, the appeal was without jurisdiction due to the nature of the order at issue. As stated above, whether the Defendants did the deeds alleged is a question for trial. Elliot v. Thomas, 937 F.2d 338, 341 (5th Cir. 1991).

B. A court of appeals should not lightly perform a sufficiency review of the summary judgment record.

Johnson permits a "detailed evidence-based review of the record" to determine what facts the district court assumed when it denied summary judgment, if not so stated. Johnson, 115 S.Ct. at 2159. Despite this Court's admonition that such be performed when a district court does not state the facts the district court assumed, the Fifth Circuit conducted an ad hoc sufficiency review of the summary judgment record. This evidentiary review is apparent in the Fifth Circuit's Order. The Order details the evidence presented concerning Thompson and Blackburn. Specifically, the Court of Appeals addresses Blackburn's affidavit and Thompson's affidavit.

App. p. 25 The Court of Appeals mentions the sworn statement of Bohlar and "another deputy." Id. The Fifth Circuit concluded that "neither defendant believed that Romero had been drinking." Id. The Fifth Circuit then discusses evidence concerning Blackburn's conduct, and the length of time the extension cord had been left in the day room. Id. At the conclusion of its review of the evidence, the Fifth Circuit concluded in its opinion that "at most this evidence is merely colorable, and was not such that a reasonable jury could return a verdict for the non-moving party." App. p. 26. This apparently was intended as limited evidentiary review anticipated by Johnson.

The Fifth Circuit's improvident procedure here appears to result from Behrens. Prior to Behrens the Fifth Circuit did not deviate from the Johnson v. Jones bright line test at least in the summary judgment context. For example, the Fifth Circuit in Jackson v. City of Atlanta, Texas, 73 F.3d 60 (5th Cir. 1996), recited the Johnson v. Jones holding stating that the Supreme Court has made it clear that the court of appeals' interlocutory jurisdiction under Mitchell begins and ends with "purely legal" aspects of qualified immunity. Likewise, the Court recited that the Fifth Circuit only had jurisdiction over the *purely law-based* denial of qualified immunity, holding that when the district court's denial turns on the existence of a factual dispute, it has no jurisdiction and must dismiss the appeal. The Fifth Circuit in considering Jackson's claims in that light considered the "purely legal" error that the Title VII claim of Jackson cannot form the basis of a second separate claim under § 1983 as well. The §1983 claim, based upon that purely legal issue, was remanded with instruction to dismiss.

Also, illustrative is the Fifth Circuit's holding in Tamez v. City of San Marcos, Texas, 62 F.3d 123 (5th Cir. 1995). The Fifth Circuit in Tamez, analyzed Johnson v. Jones, and stated that Johnson held that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pre-trial record sets forth a genuine issue of fact for trial. The Fifth Circuit considered the Plaintiffs' claims that a police officer entered Tamez's house and shot him. Tamez filed suit against the officer and

the City. The officer and the City moved for summary judgment on the grounds of qualified and official immunity. The magistrate judge determined that because disputed issues of material fact remained, summary judgment should be denied. The police officer and the City appealed the denial of their motion for summary judgment. The Fifth Circuit in considering these issues applied the Johnson v. Jones holding in the context of Mitchell that the Fifth Circuit lacked jurisdiction over the interlocutory appeal insofar as the District Court's order determined whether or not the pre-trial record set forth a genuine issue of fact for trial.

The Fifth Circuit's prior analyses of Behrens did not present an opportunity for error in that the appeal resulted from the denial of a motion to dismiss or for summary judgment. Cantu v. Rocha, 77 F.3d 795 (5th Cir. 1996). In its analysis, the court evaluates Johnson v. Jones and Behrens v. Pelletier. The Fifth Circuit noted that the Cantu appeal presented a *legal issue* antecedent to the determination of whether there were genuine issues of material fact. The review of the legal issue in that appeal went to the question of the correct legal standard to be applied. In that regard, the Court stated that "this is precisely the variety of order that Johnson distinguishes as being separable from the merits and appealable on interlocutory appeal." Id. at 803.

The Cantu Court in its analysis of Johnson v. Jones also stated that orders that resolve a fact related dispute of evidence sufficiency, i.e., which facts a party may or may not be able to prove at trial, are not immediately appealable and must await final judgment, citing Johnson v. Jones. Noteworthy is the fact that the Fifth Circuit in Cantu dealt with an appeal which resulted from a denial of a Motion for Dismissal or Summary Judgment. Cantu at 802. In that context, the legal sufficiency of the factual allegations was properly at issue.

In the instant case, however, the Fifth Circuit has taken the decision in Behrens and misapplied it in a decision that threatens the import of Johnson v. Jones. Specifically, under the apparent guise of determining what facts the District Court assumed, the Court of Appeals ignored the procedural posture below and treated the limited summary judgment

record as a trial record. The legal sufficiency of the pleadings were therefore improperly ignored.

The District Court acknowledged the pleading sufficiency. The District Court, after a careful review of all of the evidence and pleadings on file, stated in its denial that the Petitioners' factual allegations, which she assumed, were set out in her Original Complaint and her Responses to Defendants' First Motion to Dismiss and First and Second Motions for Summary Judgment, including the Affidavits and Exhibits attached thereto. App. p. 2. It is in this context that the District Court concluded that there was a genuine issue of material fact and that under the evidence presented a reasonable jury could return a verdict for the nonmoving party. Id.

The Fifth Circuit made an improper determination that the factual allegations of the summary judgment record alone were insufficient, ignoring the factual allegations in Petitioner's Complaint and the District Court's review of these factual allegations. App. p. 14. The end result of this procedure is to make any denial of a summary judgment on qualified immunity grounds appealable. Instead of determining the nature of the order appealed from, the Fifth Circuit would arbitrarily proceed with a cumbersome review of the district court record and, ignoring the procedural posture, treat the "factual allegations" of that record as a "pleading" upon which to compare the legal standard. Consequently, where no legal issue was properly raised, the Court of Appeals, in effect, created jurisdiction. This procedure guts Johnson and opens the flood gates to the harms it sought to avoid.

II. JOHNSON AND BEHRENS PRECLUDE A COURT OF APPEALS FROM BASING JURISDICTION ON AN ISSUE NOT PREVIOUSLY RAISED.

In Behrens v. Pelletier, 116 S.Ct. 834 (1996), this Court, in analyzing Johnson's application, determined that an "argument was presented by petitioner in the trial court and there is no apparent impediment to its being raised on appeal." Id. at 842. This argument was whether "all the conduct which the District Court deemed sufficiently

supported for purposes of summary judgment met the Harlow standard of "objective legal reasonableness." Id. Here, no such argument was presented to the trial court. Indeed, to the contrary, the Fifth Circuit, *sua sponte*, made factual sufficiency determinations that it was not asked to make by the Respondents. This was done without inquiry as to whether these issues had been perfected for appeal, or were otherwise ripe for determination.

The issues raised by Respondents in the Motion for Summary Judgment were specific and limited. The Petitioner's obligation at that point in the proceedings was to respond with evidence reflecting the existence of one or more genuine issues of material fact on those issues sought to be negated by the movant. Celotex Corp, 477 U.S. at 247-48, 106 S.Ct at 2510. This is precisely what the Petitioner did. To allow the Petitioner to be ambushed on appeal by the Fifth Circuit's application of a full evidentiary review after the District Court has determined that a genuine issue of material fact for trial exists violates all principles of fair play, equity as well as reasoned jurisprudence.

The Fifth Circuit, in reviewing the Respondents' appeal, went well beyond the issues presented. The Fifth Circuit, instead of focusing on the correctness of the District Court's legal determinations, conducted an extensive evidentiary review extending well beyond those issues raised by the Respondents in their Second Motion for Summary Judgment and their appeal. The Fifth Circuit even went so far as to conduct an evaluation of the weight and credibility of the evidence, ultimately determining that the evidence presented by the Petitioner was less than that which had been presented in other cases in which the Fifth Circuit has held that defendants might be held liable for the suicide of a pretrial detainee. App. p. 26. Thus purporting to hold the Petitioner to an undefined, moving standard concerning what facts *are* sufficient.

The consequences of the Fifth Circuit going beyond the issues raised by the Respondent in its appeal and in its Motion for Summary Judgment are serious. To allow the Fifth Circuit to do so, allows it to examine evidence that Petitioner was not required to prove in order to overcome its

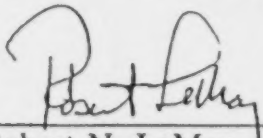
summary judgment burden. To allow such a holding forces all plaintiffs facing a motion for summary judgment to present all of their argument and evidence, regardless of what issues are raised by the motion, in order that they may prepare for battle on the appellate level. This simply violates the fundamental principles of appeal and preservation of error. Furthermore it flies in the face of judicial economy, which has been one of the fundamental arguments in support of limiting appeals of denials of motions for summary judgment based on qualified immunity to unique, abstract issues of law. See 15A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure §3914.10 p. 664 (1992). Appellate judges enjoy comparatively less expertise in such matters as the existence or non-existence of a triable issue of fact. Furthermore, questions whether there is a genuine issue of fact for trial, if appealable, would consume inordinate amounts of appellate time, causing great delay. Finally, the close connection between the question of whether there is a triable issue of fact for trial and the factual matters that will likely surface at trial means that an interlocutory appeal would require appellate courts to decide in the context of a less-developed record an issue similar to one they might later decide on a trial record that would permit a better decision. The consequence is the unwise use of judicial resources. 10 No. 5 Fed. Litigator 154 (July 1995).

CONCLUSION

This Court's decision in Johnson has been clouded, if not rendered moot by an apparent misinterpretation of the qualification of Behrens, leaving open many questions concerning what is an appealable final order and whether there is a limit on a court of appeals' scope of review on a qualified immunity appeal. This case creates an opportunity not only to correct an erroneous decision by the Fifth Circuit, but to cast light upon questions raised by Behrens.

Respectfully submitted,

KANE, RUSSELL, COLEMAN & LOGAN, P.C.

By: 

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing were served on all counsel of record, by certified U.S. mail, return receipt requested, on this 11th day of September, 1996, as follows:

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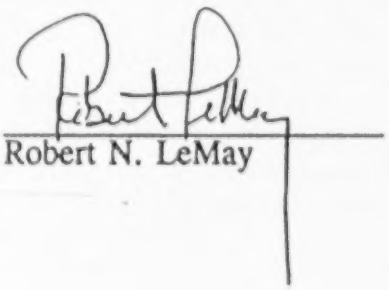

Robert N. LeMay

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT. 19, 1995
NANCY DOHERTY, CLERK
By_____
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

DEANA ROMERO, Individually and as Legal Representative of the Estate of Her Husband CONRAD JAMES ROMERO, Deceased,	§	
PLAINTIFF,	§	
v.	§	CIVIL ACTION CAUSE NUMBER
DONLEY COUNTY, TEXAS; WILLIAM J. THOMPSON, Individually and as Sheriff of Donley County, Texas; CHARLES EDWARD BLACKBURN, Individually and as Deputy Sheriff of Donley County, Texas; and TONI LYNN BOHLAR, Individually and in her Official Capacity as Deputy Sheriff of Donley County, Texas	§	2:94-CV-022-J
DEFENDANTS.	§	

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

This is an action pursuant to 42 U.S.C. § 1983 brought by Deana Romero for money damages because of the suicide of her husband, Conrad James Romero, while he was incarcerated in the Donley County Jail. Plaintiff also alleges state-law based claims of negligence, negligent training and supervision, statutory wrongful death, statutory survival, and negligence per se pursuant to § 351.001 et. seq. of the Texas Local Government Code. These claims are brought in this Court under diversity jurisdiction.

Because the Court concludes that there is a genuine issue of material fact and that under the evidence presented a reasonable jury could return a verdict for the non-moving party, Defendants' second motion for summary judgment is denied in part and granted in part as follows.

I. Background

Plaintiff's factual allegations are set out in her original complaint and her responses to Defendants' first motion to dismiss and first and second motions for summary judgment, including the affidavits and exhibits attached thereto.

Plaintiff Deana Romero is the widow of Conrad Romero. Deana Romero is a citizen of the State of New Mexico, as was the deceased. Conrad Romero, a Hispanic male then 35 or 36 years of age, was arrested at about 9:45 p.m. on February 13, 1992 in Memphis, Texas by Sheriff William Jimmy Thompson (Sheriff Thompson) of the Donley County Sheriff's Department. Bond was set at the Hall County Jail in Memphis at 11:40 p.m. in the amount of $20,000.00. After bond was set, Sheriff Thompson transported Romero to Clarendon, Texas to be incarcerated in the Donley County jail, arriving at the jail about 1:00 a.m.

on February 14, 1992. At the jail upon Romero's arrival were Sheriff Thompson, Deputy Sheriff Toni Lynn Bohlar (Deputy Bohlar), and Deputy Sheriff Charles Edward Blackburn, Sr. (Deputy Blackburn), and seven (7) other inmates.

Romero was arrested on a Donley County warrant charging him with the burglary of a building. Romero was arrested during the course of his job driving a tractor-trailer rig hauling milk for Associated Milk Producers, Inc. (AMPI). It is alleged that he and other unidentified accomplices stole money, candy and tires from a Shell service station in Clarendon, Texas. When arrested in Memphis, Romero was allegedly found in the possession of eight truck tires, two 20-pack packages of chewing gum, and approximately $22.00 in change. At the time of his pre-trial detention, Defendants knew Conrad was from New Mexico and thought he was a first-time offender.

Upon his arrival at the jail, Deputy Blackburn completed certain jail intake screening forms and placed Romero into the jail's dayroom. Deputy Blackburn was the deputy in charge that night. Sheriff Thompson had specifically instructed Deputy Blackburn to place Romero in the dayroom. Deputy Bohlar was the sole jailer/dispatcher on duty that night. Pursuant to Sheriff Thompson's jail policies, it was Deputy Bohlar's duty to make a cell check on all inmates every 30 minutes throughout the night. She came on duty at midnight on the day of Romero's suicide.

These Defendants, all citizens of the State of Texas, knew that Romero's employer was consulted on the evening in question, first by Sheriff Thompson and later by Deputy Bohlar, and that his employer was informed of Romero's arrest and of the need to get Romero's truck picked up from police custody. Plaintiff alleges that Sheriff Thompson, Deputy Bohlar and Deputy Blackburn knew at the time of the arrest that Romero was subject to tremendous trauma due to

the probable loss of his job and the resultant embarrassment and shame associated with the arrest.

Plaintiff alleges that the Defendants knew from Romero's observable behavior that he was despondent and that he exhibited objective signs of "passive quiet depression," as evidenced by his very quiet demeanor, his hesitant speech pattern and, when offered, by his refusal to place a telephone call to either his wife, family or friends in New Mexico. As evidence of this knowledge, Plaintiff has supplied the testimony of Sheriff Thompson, Deputy Blackburn, and the jail intake screening forms.

After Conrad's arrest and during the booking process, which was completed at about 1:30 a.m., Deputy Blackburn completed two screening forms by which Plaintiff alleges Blackburn wrongly determined that Romero did not pose a suicide risk. Plaintiff alleges that, contrary to official policy, these forms were only partially completed and that completion was done in a perfunctory fashion or in a sham manner. In the alternative, Plaintiff alleges that Deputy Blackburn's failure to fully complete relevant questions on these screening forms and his placing of question marks on the forms were done pursuant to de facto jail custom which the deposition of Sheriff Thompson reflects may have been accepted by the Sheriff on other occasions.[1]

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[1] Deputy Blackburn either did not answer or answered "no" with a question mark questions about: 1) whether Romero appeared to be under the influence of barbiturates, heroin or any other drugs, 2) if his skin was in good condition and free of vermin, 3) did he have purple blotches or other discolorations under his skin or his mucous membranes, and 4) did he have white patches in his mouth. The Donley County Receiving Screening Form upon which Deputy Blackburn was to answer these questions states that a "yes" answer to two or more of these questions, which are AIDS-related, and the officer's visual observations informs

Plaintiff alleges and provides unrebutted expert testimony to the effect that any competent jailer or peace officer with minimal training in suicide prevention could have, would have, and should have realized that Romero was within that class of young Hispanic males who are nationally known to be most likely to commit suicide within the first 24 hours of being incarcerated. Plaintiff alleges that Romero was obviously despondent, that he was clearly a suicide risk at least during his first 24 hours in jail, and most likely within his first 3 hours, and that he was therefore in serious need of special medical attention and inmate handling. Plaintiff alleges that despite a suicide approximately 15 months earlier than Romero's and at least six other attempted suicides in the 11 years before 1992, no training was ever given to Deputies Bohlar or Blackburn, or any other deputy in Donley County. The record reflects that no State-approved jail suicide prevention plan was formulated until after Romero's suicide. There is evidence that no significant training in identification of suicide risks was given to jail employees until after Conrad Romero's suicide, and that before this event training consisted of the Sheriff talking to his jailers about suicide prevention and other jail procedures.

After Romero's booking was complete, he was not placed in a single cell (which according to Sheriff Thompson's deposition testimony in another jail suicide case would have been county policy). Pursuant to the express order of Sheriff Thompson and in accordance with the Sheriff stated in this case was his usual policy, Romero was placed into a dayroom facility at about 1:30 a.m. because of the jail's over-crowded condition.

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the intake officer that he "should follow departmental policies and procedures with regards to notifying medical personnel and making housing arrangements."

The evidence reflects that there were 7 inmates incarcerated in the Donley County jail at the time of Romero's arrival. The jail at that time had an "official capacity" of 25 inmates. There is testimony in the record that at the time Romero was incarcerated, the jail's "observation cell" was empty. However, the Sheriff in his deposition stated that at that time his "holding cell" contained a female inmate, the "detox cell" a male inmate, and all of the five single-man cells were full. For this reason, the Sheriff ordered Blackburn to place Romero into the dayroom.

Attached to a TV located in the dayroom was a 40-foot orange extension cord. Romero fashioned this cord into a noose with which to hang himself. This cord was in the room specifically to run power over to the TV, which was regularly in the dayroom unless the Sheriff ordered it removed, which according to the Sheriff's deposition he did from time to time as punishment to the jail's inmates.

Plaintiff alleges that leaving the extension cord in the dayroom was done pursuant to established and/or de facto jail policies. There is evidence that having extension cords in a jail is contrary to regulations of the Texas Commission on Jail Standards. It is undisputed that the 40-foot extension cord was in, and was left in, the dayroom when Conrad was placed in the dayroom. It is undisputed that Deputy Blackburn did not remove it and thereby gave Romero the material to hang himself.

There is evidence in the record that Sheriff Thompson and/or Deputy Blackburn knew or should have known that the extension cord was in the dayroom at the time Romero was placed in the room by Deputy Blackburn. There is evidence in the record from which it may be reasonably concluded that Sheriff Thompson admitted to the Texas Ranger who investigated the suicide of Romero that the extension cord was regularly left in the dayroom because it provided power to the TV there.

Plaintiff alleges that Sheriff Thompson and Blackburn knowingly and/or recklessly placed Romero into a room which contained a hidden area where Romero could not be observed by the sole jailer on duty. The evidence is undisputed that the dayroom's toilet area was screened off from the view of any jailer, and that over the toilet was a metal bar or pipe from which Conrad was found suspended in air. It is not disputed that because of the physical layout of the dayroom it was hard, if not impossible, to visually observe prisoners when they went into the toilet area located therein.

The evidence reflects that parts of the dayroom were directly visible from the police dispatch office where Bohlar performed her dispatch/jailer duties. The undisputed evidence is that Deputy Bohlar could monitor sounds made in the dayroom from the dispatcher's office. The evidence is undisputed that pursuant to Sheriff Thompson's official jail policy the dayroom area of the jail was "off-limits" to all female officers.

Pursuant to Sheriff Thompson's official policy, Deputy Bohlar was the only jailer on duty at the time of Romero's incarceration. Plaintiff alleges that Deputy Bohlar did not make the once-per-half-hour inmate checks that she claims she made, nor even the frequency of checks that official policy called for, despite her actual knowledge of Romero's clear suicide risk and his special medical and other needs. At her deposition, Deputy Bohlar testified that she checked the cells once every 30 minutes. Plaintiff alleges that the jail log proves that Bohlar did not make cell checks as often as she claims she did because it does not reflect cell check entries every one-half hour as it should.[2] Plaintiff

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[2] See Exhibit #19 (Jail Log), Exhibit #3 (the Deposition of Sheriff Thompson) at pp. 101-09, 139, 147-51, 215-16, and Exhibit #4 (the Deposition of Deputy McKinney) at pp.

alleges that Deputy Bohlar left Romero unobserved for at least two hours, probably longer, contrary to established jail procedures and in conscious indifference to his known need for heightened or constant supervision. There is evidence in the record reflecting that Romero had been hanging for at least one hour, maybe two, at the time his body was discovered by another inmate.

Romero was found hanging from a bar over the toilet in the dayroom by an inmate trustee, Bobby Bouyea, whom Deputy Bohlar had allowed out of his cell at 5:55 a.m. to bring breakfast to the inmates. This inmate's statement, given to officer G. Henderson (who investigated Romero's death the day after it happened), and the deposition testimony reflect that Bobby Bouyea, the inmate who discovered the body a few minutes before 6:00 a.m, could see from outside the dayroom Romero's feet hanging over the toilet.[3] Why Deputy Bohlar could not also observe this remains unexplained.

Plaintiff alleges that Bohlar knew that she could not see Romero when she made her required rounds of the jail, and that she then made a conscious choice to not call in another Deputy to make the required dayroom inspections, despite knowledge of her authority to do so. While acknowledging that official policy forbid Bohlar from entering the dayroom alone to make her required checks on Romero, Plaintiff alleges that jail policy authorized the jailer on duty to call in another deputy to help her perform her duties, including cell checks.

53-56; all of which are attached to Plaintiff's response, filed April 5, 1995, to Defendants' motion for summary judgment.

[3] See Exhibit #10 (Texas DPS Report) at pp. 2-3.

Plaintiff further alleges that because Deputy Bohlar was the only jailer on duty at the time, and because she did double duty as the radio/telephone dispatcher for the Donley County Sheriff's Office, the Donley County Emergency Medical Response Team, the Fire Department, and was the County's 911 dispatcher, the official policy of Donley County was either deliberately indifferent to Romero's needs, or it intentionally ignored them. Plaintiff alleges that the multiple duties of the jailer on duty, coupled with Deputy Bohlar's choice to not make adequate dayroom checks and her failure to even check on Romero after 4:00 a.m., and Sheriff Thompson's decision to place Romero in the dayroom containing all the materials necessary to hang himself and the privacy to do so, and Deputy Blackburn's placement of Romero in the dayroom without first removing the extension cord, and Sheriff Thompson's failure to train his deputies in suicide recognition and prevention, together with other inadequate official policies and/or de facto customs or practices of Donley County, were grossly negligent and were deliberately indifferent to the safety and lives of the citizens of Donley County.

Plaintiff alleges that Romero's suicide, which was discovered shortly before 6:00 a.m., was a foreseeable and foregone consequence of each of the Defendants' actions and/or inactions. Plaintiff alleges that these acts proximately caused the death of Romero within less than 4½ hours of the time he was placed into the dayroom. Plaintiff alleges that his suicide was clearly foreseeable because these same policies caused an earlier suicide -- the death of Juan Silva on November 8, 1990 (15 months earlier and within 3 hours of the time Juan Silva was booked into the Donley County jail).[4]

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[4] A constitutional tort action in this Court based on Juan Silva's suicide was filed in this Court. Denial of Defendants' qualified immunity summary judgment motion was appealed

Plaintiff specifically alleges that Sheriff Thompson failed to properly train his jail staff to evaluate suicidal tendencies in suicidal prisoners, failed to properly develop and implement written policies for timely and adequate visual monitoring of offenders with such tendencies, and failed to place such persons in clearly lighted cells with other persons, or even a single cell without access to materials with which he could kill himself.[3] Plaintiff alleges a general failure to develop and maintain an adequate oral or written suicide prevention plan in the county jail and to provide proper staffing, training and other safeguards relating to inmate suicides and suicide attempts. Plaintiff alleges that all of these acts or inactions denied Romero his constitutional rights under the Constitution of the United States, and under Texas law. Plaintiff seeks compensatory and punitive damages, and alleges that the Defendants acted under color of state law and in their official capacities at all times.

Defendants deny Plaintiff's allegations and her right to any relief pursuant to law. Defendant Donley County asserts that Plaintiff has failed to provide competent evidence of a pattern of actions or inactions taken or done pursuant to the acts or decisions of official policy-makers who were responsible for making final policy decisions for the County. Sheriff Thompson and the Deputy Sheriffs each assert affirmative defenses based on qualified immunity. Asserting a lack of competent evidence, Defendants seek judgment on all claims against the County as well as the Defendants individually.

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to, and affirmed in part by, the Fifth Circuit.

[3] The jail standards, promulgated by the Texas Commission on Jail Standards, which Plaintiff alleges were violated by Defendants include: § 217.06.049 & .056 (lighting); § 217.06.068 (observation panels); and § 217.06.073 (extension cords).

II. Summary Judgment Standards

The Supreme Court, in an unanimous opinion written by Justice Breyer, recently held that a district court's determination that the summary judgment record in a constitutional tort case raised a genuine issue of material fact concerning whether peace officers were entitled to qualified immunity was not a "final decision" within the meaning of the federal appellate jurisdiction statute, 28 U.S.C. § 1291, and therefore was not an immediately appealable order. Johnson v. Jones, ____ U.S. ____, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995). This holding clearly applies to this case.

The Court may terminate litigation by rendering a summary judgment pursuant to Rule 56 where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Once the movant makes an initial showing with competent evidence, the party opposed must offer evidence reflecting the existence of one or more genuine issues of material fact. Id., 477 U.S. at 322-23, 106 S.Ct. at 2552. The bare allegations of the pleadings will not suffice. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986); Celotex Corp., 477 U.S. at 323-25, 106 S.Ct. at 2553. The nonmoving party must designate specific facts showing there exists a genuine issue of material fact on those elements sought to be negated by the movant. Liberty Lobby, 477 U.S. at 247-48, 106 S.Ct. at 2510; Celotex Corp., 477 U.S. at 322-23, 106 S.Ct. at 2553; Fed. R. Civ. Pro. 56(e). Legal conclusions and general allegations do not satisfy this burden. Liberty Lobby., 477 U.S. at 250, 106 S.Ct. at 2511.

While an allegation of the existence of a disputed material fact is not sufficient to defeat a motion for summary

judgment, if the evidence shows that a reasonable jury could return a verdict for the non-moving party, then the dispute is genuine. Id., 477 U.S. at 247-48, 106 S.Ct. at 2510; Green v. Touro Infirmary, 992 F.2d 537, 538-39 (5th Cir. 1993). "Finally, where the non-moving party has presented evidence to support the essential elements of its claims but that evidence is merely colorable, or is not significantly probative, summary judgement may be granted." Anderson, 477 U.S. at 249-50, 106 S.Ct. at 2510-11 (citations omitted).[6]

III. Discussion

In order to maintain a claim under 42 U.S.C. § 1983,[7] Plaintiff must show two essential elements:

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[6] See, e.g. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 2510, 89 L.Ed.2d 538 (1986)(a genuine dispute requires more than metaphysical doubt); Ruiz v. Whirlpool, Inc., 12 F.3d 510, 513 (5th Cir. 1994)(speculation and conjecture not enough to raise a genuine issue); Hibernia Nat'l Bank v. Carner, 997 F.2d 94 (5th Cir. 1993); Pennington v. Vistron Corp., 876 F.2d 414, 426 (5th Cir. 1989)(must be a showing of fact). A conclusory assertion made in pleadings, affidavits or at deposition is simply not enough evidence to raise a genuine issue of material fact. Lechuga v. Southern Pacific Transp. Co., 949 F.2d 790, 798 (5th Cir. 1992); Galindo v. Precision Am. Corp., 754 F.2d 1212, 1216 (5th Cir. 1985).

[7] Section 1983 of Title 42, U.S. Code, states:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

(1) that defendant(s) deprived her of a right secured by the Constitution or laws of the United States, and

(2) that this deprivation occurred while defendant(s) were acting under color of state law.

Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 510 (5th Cir. 1980). It is not disputed here that Defendants were acting under color of state law, just that there is sufficient competent evidence that their actions or inactions in fact legally caused a compensable injury to Plaintiff.

State actors can be individually liable for deprivations if they are personally involved in the acts causing the deprivation of constitutional rights, or if there is a causal connection between the acts taken and the unconstitutional violations sought to be redressed. Lozano v. Smith, 718 F.2d 756, 768 (5th Cir. 1983); Merritt v. Harris County, Texas, 775 S.W.2d 17, 23 (Text App.-Houston [14th Dist.] 1989, writ denied). A causal connection is established when a constitutional deprivation occurs because of the implementation of a wrongful policy or act. Lozano, supra, 718 F.2d at 768. However, there is no causal connection where the acts taken are properly done pursuant to state law, or under a lawful order of the court. See Merritt, supra, 775 S.W.2d at 23-24; Tex. Local Govt. Code Ann. S 86.021 (Vernon 1988)(state peace officers are charged with execution of all process, warrants, and precepts directed to them).

Qualified immunity is a defense that must be pled by a defendant official. Gomez v. Toledo, 446 U.S. 635, 100

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injured in an action at law, suit in equity, or other proper proceeding for redress.

S.Ct. 1920, 64 L.Ed.2d 572 (1980); Harlow v. Fitzgerald, 457 U.S. 800, 815, 102 S.Ct. 2727, 2736-2737, 73 L.Ed.2d 396 (1982). Once a defendant raises the defense of qualified immunity, "the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred . . .." Harlow, supra, 457 U.S. at 818, 102 S.Ct. at 2738. This determination requires examination of both federal and state law.

The federal courts have long made it clear that deliberate indifference to the obviously serious medical needs of a pretrial detainee violates his or her constitutional rights. Burns v. City of Galveston, Texas, 905 F.2d 100, 104 (5th Cir. 1990); Cupit v. Jones, 835 F.2d 82, 85 (5th Cir. 1987); Partridge v. Two Unknown Police Officers of Houston, 791 F.2d 1182, 1186 (5th Cir. 1986); Bell v. Wolfish, 441 U.S. 520, 535-36 (1979). It was clearly established at least by 1992 that the defendant officials here had a constitutional duty to respond at a minimum without deliberate indifference to Romero's serious medical needs, including suicidal tendencies, if they were objectively obvious. The Defendants contend that they were not; Plaintiff has produced competent evidence, including expert testimony, that they were.

The Supreme Court has "clarif[ied] the analytical structure under which a claim of qualified immunity should be addressed." Siegert v. Gilley, 500 U.S. , 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). Courts should first determine from looking at the pleadings whether a plaintiff has satisfactorily alleged facts showing a potential violation of constitutional or statutory rights before going on to consider whether a defendant is entitled to qualified immunity. Siegert v. Gilley, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). With this in mind, the Court has considered Plaintiff's factual allegations. The Court concludes that Plaintiff has alleged sufficient facts and has produced some evidence showing a potential violation of

constitutional rights by only two of the individual Defendants.

Plaintiff has plead facts and brought forward evidence showing Sheriff Thompson's personal involvement in the arrest, booking, and decision to incarcerate Romero in the dayroom. Plaintiff therefore seeks to hold the Sheriff liable not only to the extent of his conceded role as final policy-maker for those Donley County law enforcement policies that allegedly lead to deprivations of Romero's constitutional rights, but also for his individual decision and order to place Romero into the dayroom.[8] There is some evidence that Donley County had no suicide prevention training policy in effect until late 1992 or, in the alternative, that if Sheriff Thompson had any training policy it was virtually ignored. It is not disputed that pursuant to state jail regulations the 40-foot extension cord at issue should not have been in the jail.

After he arrested Conrad, Sheriff Thompson brought Romero back from Memphis to his jail at Clarendon, a distance of about 27 miles. The Sheriff testified that he and Conrad talked on the trip back. There is evidence in the record from which it could be concluded that Sheriff

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[8] According to Tex. Loc. Gov't Code Ann. § 351.041 (Vernon 1988), each sheriff is the keeper of the jail of his county. He shall safely keep therein all prisoners committed by lawful authority, subject to order of the proper court, and shall be responsible for the safe keeping of prisoners. Id. at section 351.041(a). The sheriff may appoint a jailer to operate the jail, and supply the needs of those confined; but in all cases "the sheriff shall continue to exercise supervision and control over the jail." Id. at § 351.041(b). See also McBeath v. Campbell, 12 S.W.2d 118, 120 (Tex. Com. App. 1929)(imposing liability pursuant to article 5116, now codified as § 341.041).

Thompson had ample opportunity to observe Conrad Romero's behavior and mental state. There is evidence in the record raising a genuine issue of material fact as to whether Sheriff Thompson should have been alerted to Conrad's special suicide prevention needs, or whether he was and ignored them.

Likewise, Plaintiff produces evidence which shows a genuine question of material fact as to whether Deputy Blackburn's actions violated established jail policy regarding screening procedures, or was done pursuant to an established de facto policy or custom allowing such incomplete records. The record reflects that the jail screening form was not filed out completely by Blackburn. Sheriff Thompson indicated in his deposition the form should have been filled out to the fullest extent it could be. The facts are simply disputed as to whether the form could have or should have been filed out better.

Plaintiff also seeks to hold Deputy Blackburn individually liable because he put Conrad in the dayroom and did not remove the extension cord. Deputy Blackburn admits that he put Romero in the dayroom. It is undisputed that Blackburn did not remove the cord. It is undisputed that Conrad used the cord to hang himself. Both Defendants deny that they know who put the extension cord into the jail's dayroom. There is evidence in the record reflecting that the cord had been in the dayroom for a long enough period of time for both Thompson and Blackburn to know it was there. The Court has not been cited to jail policy on who, if anyone, had the responsibility to check the dayroom for the purpose of removing County-owned property, such as the extension cord, which should not have been left with a despondent and/or suicidal inmate.

Upon this disputed factual record, the Court determines that summary judgment cannot be granted these two Defendants. Johnson v. Jones, 115 S.Ct. 2151, 2156

(1994). However, summary judgment will be granted to Deputy Bohlar.

The Court concludes that Deputy Bohlar's alleged action and inactions were either done pursuant to official or de facto jail policy, which she had no authority to set or modify, or were discretionary acts. There is no evidence in the record that her actions or inactions were done with malice or ill will. At most, the evidence shows that her inactions either amount to mere negligence, which is not actionable pursuant to §1983, or are actions for which she is entitled to qualified immunity.

Plaintiff does not dispute that Bohlar visually monitored Romero while he was in the dayroom, only that she visually checked him every 30 minutes. While her jailer's log does not have entries showing an observation every 30 minutes, as jail policy states it should, the undisputed evidence is that such failures to "log-in" cell checks were permitted by de facto jail policy.

Deputy Bohlar did not complete any jail intake or booking forms on Romero. There is no evidence that she spoke to Conrad at any time, and no allegation that she even had a duty to observe Conrad's behavior during the screening process. The undisputed evidence reflects that Deputy Bohlar did not have anything to do with booking Romero into the jail nor with placing him into the dayroom. Plaintiff does not dispute that jail policy prevented Deputy Bohlar from personally entering the dayroom to check on Romero, or that the Sheriff's decision to place Romero in the day effectively put Romero into a location where, because of the physical layout of the jail, Bohlar could not observe Romero at all times. It is undisputed that even if Bohlar had checked on Romero every 30 minutes, he still could have successfully committed suicide in the manner he did.

The undisputed evidence reflects that Romero's ability to commit suicide was assured when he was placed in the dayroom and the extension cord was not removed. Plaintiff does not contend, and it is undisputed, that Deputy Bohlar had no part in those decisions or acts. The allegation that she could have called in a male deputy to make a dayroom check, but chose not to do so, is insufficient to pierce her qualified immunity defense or to show she legally caused Romero's suicide. See, e.g. Aurora Silva v. Donley County, Texas, et al., No. 93-1308 (5th Cir. July 28, 1994) (per curium) (Similar inactions of sole jailer/dispatcher on duty were insufficient to prevent qualified immunity from providing a complete defense).

The Court concludes that Deputy Bohlar should be granted summary judgment, but that Deputy Blackburn and Sheriff Thompson are not entitled to summary judgment on Plaintiff's §1983 claims under the doctrine of qualified immunity.

Defendant Donley County asserts that punitive damages cannot be awarded against it or against Defendants Thompson and Blackburn in their official capacities. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 2761, 69 L.Ed.2d 616 (1981). However, an award of punitive damages is possible against Defendants Thompson or Blackburn, who are also sued in their individual capacity. Green v. McKaskle, 788 F.2d 1116, 1124 (5th Cir. 1986). Therefore to the extent that Defendants seek dismissal of all punitive damages claims, that request is denied.

V. Conclusions

Defendants' motion for summary judgment is DENIED as to Defendants Donley County, Sheriff William Thompson, and Deputy Sheriff Charles Blackburn, Senior. Defendants' motion for summary judgment is GRANTED as to Plaintiff's § 1983 and state-law based claims against

Deputy Sheriff Toni Lynn Bohlar. Judgment will be entered in accordance with this opinion.

It is SO ORDERED.

Signed this the 19th day of October, 1995.

s/Mary Lou Robinson
MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

U.S. COURT OF APPEALS
FILED
MAY 14, 1996
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No 95-10971
Summary Calendar

DEANA ROMERO, Individually and as Legal Representative of the Estate of Conrad James Romero,

Plaintiff-Appellee,

versus

DONLEY COUNTY, TEXAS; TONI LYNN BOHLAR, Deputy, Individually and in her official capacity,

Defendants,

and

WILLIAM J. THOMPSON, Individually and in his official capacity as the Donley County Sheriff; CHARLES EDWARD BLACKBURN, Deputy, Individually and in his official capacity,

Defendants-Appellants.

Appeal from the United States District Court for
the Northern District of Texas
(2:94-CV-22)

Before REAVLEY, DUHÉ and WIENER, Circuit Judges.

PER CURIAM:*

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* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

William Thompson and Charles Blackburn, claiming qualified immunity from suit, bring this interlocutory appeal of a district court order denying their motion for summary judgment. We dismiss the appeal as to Thompson and Blackburn in their official capacities, and reverse the summary judgment as to Thompson and Blackburn individually.

BACKGROUND

Defendant Thompson is the Sheriff of Donley County, Texas. He arrested Conrad Romero on burglary charges on February 13, 1992, and transported Romero to the Donley County jail, arriving at the jail at about 1:00 a.m. on February 14, 1992. Defendant Blackburn, a deputy sheriff, was at the jail at the time of Romero's arrival. Blackburn filled out certain jail intake forms, including one where he indicated that the inmate did not exhibit behavior suggesting the risk of suicide. Thompson directed Blackburn to place Romero in the jail's day room.

The day room contained a 40-foot long orange extension cord attached to a television set. The toilet area of the day room was screened, and over the toilet was a metal bar or pipe. Deputy sheriff Toni Bohlar was the only jailer on duty at the time of Romero's suicide.[9] Pursuant to Sheriff Thompson's policy the day room was off-limits to female officers. The evidence is disputed as to whether Bohlar made inmate checks every thirty minutes, as she claimed. She admitted that she could not see Romero when she made her checks. An inmate trustee found Romero hanging from the bar over the toilet at 5:55 a.m. Romero had used the extension cord to hang himself.

Fifteen months earlier, another pretrial detainee, Juan Silva, had committed suicide by hanging himself in one of the cells at the jail.[10] Plaintiff in our case claims that even after this suicide the training of jail personnel in suicide detection and prevention was woefully inadequate, as was the level of staffing.

Romero's widow brought this suit individually and on behalf of the estate of Romero, asserting violation of

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[9] Bohlar was also sued in this case, but the district court granted summary judgment in her favor.

[10] Silva's suicide also led to a civil rights suit. As in our case, the district court denied a summary judgment motion wherein the defendants claimed qualified immunity. We dismissed the appeal of the order denying summary judgment as to Sheriff Thompson and another defendant. Silva v. Donley County, No. 93-1308 (5th Cir. July 28, 1994). While unpublished opinions prior to January 1, 1996 are precedent in our circuit, Fifth Circuit, Rule 47.5.3, we conclude that a new rule applies in our case because of our intervening en banc decision in Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996), discussed below.

Romero's civil rights under 42 U.S.C. § 1983 and state law claims. Defendants Thompson and Blackburn appeal the district court's order denying their motion for summary judgment.

DISCUSSION

An interlocutory order denying a motion for summary judgment by defendants claiming qualified immunity is immediately appealable, unless the order resolved a fact-related dispute about "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial."[11] The Supreme Court more recently explained, however, that jurisdiction over an interlocutory appeal in this context is not lacking simply because "[m]aterial issues of fact remain," since "[e]very denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact . . . ."[12] Instead, the order is not appealable if the district court's "sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred . . . ."[13] In this case, we believe that we have jurisdiction because, deferring completely to plaintiff's factual claims of alleged conduct, her § 1983 claim cannot stand.

In Hare v. City of Corinth,[14] a summary judgment case involving the suicide of a pretrial detainee, we addressed the standard for determining qualified immunity.

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[11] Johnson v. Jones, 115 S. Ct. 2151, 2153 (1995).

[12] Behrens v. Pelletier, 116 S. Ct. 834, 842 (1996).

[13] Id.

[14] 74 F.3d 633 (5th Cir. 1996) (en banc).

We held that the defendant's conduct must amount to more that mere negligence or even gross negligence.[15] Instead, liability attaches under §1983 for the episodic act or omission of a state jail official only where the official acted or failed to act with deliberate indifference to the detainee's needs.[16] Deliberate indifference means that the official "'knows that the inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'"[17]

A. The County

Deana Romero sued Thompson and Blackburn individually and in their official capacities as the sheriff and deputy sheriff of Donley County. Defendants appeal in their individual and official capacities. A suit against county officials in their official capacities is a suit against the county.[18] We have no jurisdiction to entertain an interlocutory appeal by the county.[19] Accordingly, the appeal by the county is dismissed.[20]

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[15] Id. at 645-6.

[16] Id. at 647-48

[17] Id. at 648 (quoting Farmer v. Brennan, 114 S. Ct. 1970, 1984 (1994)).

[18] Rhyne v. Henderson County, 973 F.2d 386, 392 n.2 (5th Cir. 1992).

[19] Nicoletti v. City of Waco, 947 F.2d 190, 191-92 (5th Cir. 1991).

[20] We note, however, that on this record there is no underlying constitutional violation on which to hold the county liable under § 1983, as discussed below.

B. Individual Liability

Blackburn filled out the inmate screening form for Romero, indicating that Romero was not a suicide risk. Blackburn swore by affidavit that "Romero seemed liked a typical arrested individual" and "Romero's conduct did not show any signs that he was going to commit suicide." Like Blackburn, Thompson swore in his affidavit that Romero was a typical arrestee who did not seem to be suffering from any mental problems. Another deputy and Bohlar had personally observed Romero and gave sworn statements to the same effect. Neither defendant believed that Romero had been drinking, although Blackburn placed a question mark beside the question on the booking form inquiring whether the inmate appeared to be under the influence of barbiturates or other drugs.

The district court, in discussing Blackburn's conduct, noted evidence that Blackburn did not completely fill out the screening form and, at Thompson's direction, placed Romero in the day room. Plaintiff also relies on evidence that the cord had been in the day room for a long enough period of time for Blackburn and Thompson to have known that it was there.

The deliberate indifference standard compels the conclusion that Thompson's and Blackburn's conduct or inaction could give rise to liability only if they knew that Romero faced a substantial risk of committing suicide. Placing an inmate in a day room with an extension cord cannot amount to deliberate indifference unless they had such knowledge.

Thompson's and Blackburn's sworn statements in the record, based on their observations of Romero, indicate that Romero did not display any suicidal tendencies. Plaintiff failed to raise a genuine issue of material fact suggesting otherwise, i.e. that these officers knew that Romero faced a

substantial risk of suicide. Plaintiff offered the affidavit of an expert stating that "Romero was subject to tremendous trauma due to the probable loss of his job and the resultant embarrassment and shame associated with the arrest," and that as a young prisoner (Romero was 36), he was a higher than usual risk for suicide according to national surveys. The expert affidavit sheds no light on whether Blackburn or Thompson personally and subjectively knew that Romero was a substantial suicide risk. We have noted that "[p]olice personnel are not required to 'unerringly detect suicidal tendencies;' such an exacting standard 'requires the skill of an experienced medical professional with psychiatric training. . . .'"[21]

Plaintiff also offered evidence that Romero was quiet after his incarceration, hesitated in answering questions posed by Blackburn, and did not exercise his right to make a phone call. Romero told Blackburn that he was a first-time offender, Thompson viewed him as a first-time offender, and Thompson knew his employer would be notified about the arrest. At most this evidence is "merely colorable" on the critical issue of whether defendants knew that Romero faced a substantial risk of suicide, and is not "such that a reasonable jury could return a verdict for the nonmoving party".[22] Accordingly, summary judgment should have been granted in favor of Thompson and Blackburn on the § 1983 claim, since "there is no issue for trial unless there is

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[21] Evans v. City of Marlin, 986 F.2d 104, 107 (5th Cir. 1993) (quoting Burns v. City of Galveston, 905 F.2d 100, 104 (5th Cir. 1990).

[22] Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986).

sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."[23]

The evidence presented here by plaintiff falls far short of the evidence presented in other cases where we have held that defendants might be found liable for the suicide of a pretrial detainee. In Hare, we remanded for further proceedings in light of our clarified standard for imposing liability, where summary judgment evidence was offered that the police were informed that the detainee was a heavy drug user, she gave an interview "in a defensive, 'fetal-type' position," admitted she was a drug addict, was observed by the police going through drug withdrawal, attempted to destroy the interview videotape, was described by witnesses as emotionally distraught, "frantic," and "hyper," and threatened to commit suicide in the presence of the police captain and "in a serious, believable tone of voice."[24]

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[23] Id. at 249.

[24] Hare, 74 F.3d at 636-37. See also Lewis v. Parish of Terrebone, 894 F.2d 142, 145 (5th Cir. 1990) (affirming jury verdict in favor of plaintiffs where jury heard evidence "(1) that the deceased had expressed [to the jail nurse and warden] a death wish, (2) that the decedent alleged consuming an inordinate number of pills which required medical emergency treatment, (3) that the emergency room physician ordered a psychiatric examination, (4) that the deceased was transported to New Orleans from the jail for such an examination, (5) that the deceased was transported from New Orleans to the jail after the examination, (6) that the envelope [containing a medical opinion that the deceased was suicidal] given to the driver of the transporting vehicle was delivered to the jail, (7) that another jail employee believed the deceased to be suicidal and should not be left alone and (8) that the deceased was housed in a solitary confinement cell immediately prior to this death."); Partridge

We also conclude that Thompson cannot be held liable for failing to properly supervise or train other employees in his charge. We held in Doe v. Taylor Indep. Sch. Dist.[25] that the standard for imposing liability on a municipality should apply to an individual to whom a municipality had delegated responsibility for the direct supervision of employees. That standard imposes liability where "the official, by action or inaction, demonstrates a deliberate indifference to [the plaintiff's] constitutional rights."[26] In Hare, we clarified that municipal liability turns on objective deliberate indifference:

> Our opinion in this case makes clear that to prove an underlying constitutional violation in an individual or episodic acts case, a pre-trial detainee must establish that an official acted with subjective deliberate

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v. Two Unknown Police Officers of the City of Houston, 791 F.2d 1182, 1184 (5th Cir. 1986) (reversing dismissal of complaint alleging that decedent became hysterical during questioning after arrest, arresting officer was told that decedent had suffered a nervous breakdown, decedent was wearing two medical alert bracelets, decedent became agitated and violent in police car, decedent deliberately struck his head against police car seat divider and attempted to kick out the doors and windows of the car, arresting officers did not call to anyone's attention the aberrant behavior, police department knew decedent was a mental patient and had records that he had attempted suicide during an earlier confinement, defendant was booked as "heart and mental," and decedent was placed in solitary confinement where he hung himself.)

[25] 15 F.3d 443, 453-54 (5th Cir.) (en banc), cert. denied, 115 S. Ct. 70 (1994).

[26] Id. at 454.

> indifference. Once the detainee has met this burden, she has proved a violation of her rights under the Due Process Clause. To succeed in holding a municipality accountable for that due process violation, however, the detainee must show that the municipal employee's act resulted from a municipal policy or custom adopted or maintained with objective deliberate indifference to the detainee's constitutional rights.[27]

Both Doe and Hare make clear, however, that imposing liability on a supervisor or municipality requires proof that the plaintiff's constitutional rights were violated. Hare, in the passage quoted above, requires an "underlying constitutional violation." Similarly, Doe requires proof that the supervisor's deliberate indifference "caused a constitutional injury to the [plaintiff]."[28] Given that Blackburn and Thompson established that they did not individually act or fail to act with deliberate indifference to Romero's needs, there is no underlying constitutional tort on which to hold Thompson liable in his capacity as a supervisor.

Further, we have held that "[a] municipality should be required to provide its police officers with minimal training to detect 'obvious medical needs of detainees with known, demonstrable, and serious mental disorders.' . . . In the absence of any manifest signs that the Decedent was a danger to herself, the city's failure to train police personnel to detect potential suicidal impulses does not give rise to a deprivation of constitutional rights."[29] Given the failure of proof that

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[27] Hare, 74 F.3d at 649 n.4.

[28] 15 F.3d at 454.

[29] Evans, 986 F.2d at 107-08 (quoting Burns, 905 F.2d at 104).

Romero was an obvious and manifest suicide risk, liability premised on Thompson's alleged failure to train his staff in suicide prevention and detection must also fail.

C. State Law Claims

Plaintiff also asserted state law claims against Blackburn and Thompson for negligence, statutory wrongful death, and statutory survival. The individual defendants claim qualified immunity from suit under Texas law. We have jurisdiction to address this issue.[30]

We have described Texas' law of qualified immunity as "substantially the same as federal immunity law."[31] Government officials are immune from suits arising from performance of their discretionary duties in good faith as long as they were acting within the scope of their authority.[32] Here there is no question that Blackburn and Thompson were acting within the scope of their authority and that all decisions regarding training and the placement and observation of Romero in the day room were discretionary in nature. Actions are discretionary unless "the law prescribes and defines the duties to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment. . . ."[33]

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[30] Cantu v. Rocha, 77 F.3d 795, 803-04 (5th Cir. 1996); Morin v. Caire, 77 F.3d 116, 119-20 (5th Cir. 1996).

[31] Cantu, 77 F.3d at 808.

[32] Id.

[33] City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994) (quoting Rains v. Simpson, 50 Tex. 495, 501 (1878)).

Thus the question is whether these defendants acted in good faith. Both swore that they harbored no ill will toward Romero, and discharged their duties toward him in good faith and without any intent to cause him harm.

Under Texas immunity law, "[a]n official acts in 'good faith' if any reasonably prudent officer could have believed that the conduct was consistent with the plaintiff's rights."[34] "To controvert the officer's summary judgment proof on good faith . . . the plaintiff must show that 'no reasonable person in the defendant's position could have thought the facts were such that they justified defendant's acts,'" and "'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'"[35] In adopting this test the Texas Supreme Court stated that it is derived substantially from the federal test for deciding immunity under § 1983.[36] We have recognized that federal constitutional standards do not require such training of officers that they will "unerringly detect suicidal tendencies."[37] Likewise, we conclude that Texas law does not require every officer to possess such skills where the detainee, as here, did not manifest "known, demonstrable,

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[34] Cantu, 77 F.3d at 809 (emphasis added).

[35] Chambers, 883 S.W. 2d at 657 (emphasis added) (quoting Post v. City of Fort Lauderdale, 7 F.3d 1552, 1557 (11th Cir. 1993) and Malley v. Briggs, 106 S. Ct. 1092, 1096 (1986)).

[36] Chambers, 883 S.W.2d at 656.

[37] Burns, 905 F.2d at 104.

and serious mental disorders."[38] Accordingly, Blackburn and Thompson are entitled to immunity under state law.[39]

CONCLUSION

The appeal as to Thompson and Blackburn in their official capacities is DISMISSED. The summary judgment as to Thompson and Blackburn individually is REVERSED and REMANDED with instructions to dismiss them as defendants.

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[38] Id.

[39] We express no opinion as to whether summary judgment on state law claims against the county is appropriate, or whether such claims should proceed in federal court in the absence of any federal claims. See Evans, 986 F.2d at 108-09 (discussing municipal liability under state law for inmate suicide); Ryhne, 973 F.2d at 395 (discussing discretion of district court to dismiss state claims after dismissal of federal claims).

U.S. COURT OF APPEALS
FILED
JUNE 13, 1996
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10971

DEANA ROMERO, Individually and as Legal Representative of the Estate of Conrad James Romero

Plaintiff - Appellee

v.

DONLEY COUNTY TX; TONI LYNN BOHLAR, Deputy, Individually and in her Official Capacity

and

WILLIAM J THOMPSON, Individually and in his Official Capacity as the Donley County Sheriff; CHARLES EDWARD BLACKBURN, Deputy, Individually and in his Official Capacity

Defendants - Appellants

Appeal from the United States District Court for the Northern District of Texas, Amarillo

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ON PETITION FOR REHEARING

(June 13, 1996)

Before REAVLEY, DUHÉ and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

CLERK'S NOTE
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF
THE MANDATE

ENTERED FOR THE COURT:

s/John M. Duhé, Jr.
United States Circuit Judge